

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTONIO REYES-MELGOZA,

Defendant.

2:05-cr-0345-LDG-GWF

ORDER

The indictment in this case charges Antonio Reyes-Melgoza with unlawful re-entry into the United States. Reyes-Melgoza has filed a motion to dismiss the indictment based on prior unlawful deportation (#26, response #27, reply #29).

In considering a motion to dismiss an indictment based on a prior unlawful deportation, the court must consider whether the defendant has met the burden of proving that in his previous deportation (1) the proceeding was so flawed that it effectively eliminated the right of the alien to obtain judicial review, and (2) prejudice as a result of the error(s). *United States v. Alvarado-Delgado*, 98 F.3d 492, 493 (9th Cir. 1996) (citations omitted). In order to prove prejudice, the alien defendant must show that there were plausible grounds for his relief from deportation. *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999).

To determine whether plausible grounds for relief existed in Reyes-Melgoza's case, the court must consider all of the elements of eligibility required to obtain a waiver under § 212(h) of the Immigration and Naturalization Act. Reyes-Melgoza must show that (1) he has a spouse, parent, or child who is either a citizen of the United States or a lawful permanent

1 resident; (2) his exclusion from the United States would cause extreme hardship for that
2 family member; and (3) his admission to the United States “would not be contrary to the
3 national welfare, safety, or security of the United States.” Immigration and Naturalization Act
4 § 212(h).

5 In this case, the Reyes-Melgoza has shown that both deportation proceedings were
6 flawed. During the 1989 proceeding, the Immigration Judge failed to inform Reyes-Melgoza
7 that he might have been eligible for relief under Immigration and Naturalization Act § 212(h).
8 In the 2001–2003 proceedings the Immigration Judge failed to conduct a categorical Taylor
9 analysis prior to categorizing Rape in Concert as an aggravated felony. The government has
10 conceded that both of these proceedings were flawed; however, Reyes-Melgoza must still
11 show that there were plausible grounds for relief from deportation.

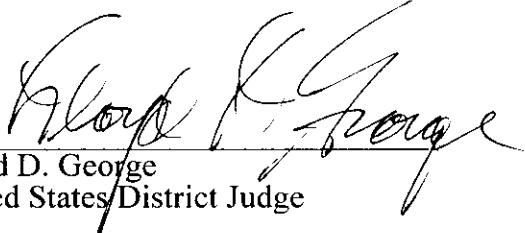
12 While Reyes-Melgoza has shown that he has family members who are either citizens of
13 the United States or lawful permanent residents¹, he has failed to establish that his exclusion
14 from the United States would cause extreme hardship for any of those family members. The
15 Ninth Circuit narrowly interprets the “extreme hardships” standard. For example, in *United*
16 *States v. Arce-Hernandez*, 163 F.3d 559, 563-64 (9th Cir. 1998), the court ultimately found that
17 the ill wife and children of the defendant would face economic hardship whether they stayed
18 in the United States or went to Mexico. However, although those circumstances were
19 undoubtedly “hardships,” the court could not deem them “extreme and beyond the common
20 results of deportation of a convict.” *Id.* at 564. Here, Reyes-Melgoza has not shown that the
21 hardship his wife and children may suffer upon his deportation fall within the “extreme
22 hardship” standard as applied by the Ninth Circuit, and therefore has not met his burden of
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25 ¹Reyes-Melgoza’s wife is a U.S. citizen, his children are all U.S. citizens, his mother is
26 a U.S. citizen, and his father is a permanent resident of the United States.

1 showing a plausible chance of receiving a § 212(h) waiver in his prior deportation
2 proceedings. For these reasons,

3 THE COURT HEREBY ORDERS that the motion to dismiss the indictment based on
4 prior unlawful deportations (#26) is DENIED.

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6 DATED this 8 day of August, 2006.

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9 Lloyd D. George
10 United States District Judge
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